cannot lose sight of important Congressional mandates when crafting the leased access rules. Leased access was intended to remove a cable operator's editorial discretion over the programming carried on certain channels. It was not intended to guarantee certain programmers access or to ensure the survival of programs that were not commercially viable. Leased access is only a delivery vehicle. Leased access cannot become an economic subsidy by any operator, especially not by small cable.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the	)	
Cable Television Consumer Protection	)	CS Docket No. 96-60
and Competition Act of 1992	)	
Rate Regulation	)	
	)	
Leased Commercial Access	)	

REPLY COMMENTS OF THE SMALL CABLE BUSINESS ASSOCIATION

I. INTRODUCTION

Responding out of concern for the total disregard of the disparate impact of the Commission's proposed leased access rules on small cable, the Small Cable Business Association ("SCBA") filed comprehensive comments providing both critical analysis and constructive solutions. The positions adopted by leased access programming interests in comments filed in this Docket validate many of the concerns raised by SCBA. SCBA highlights these issues to assist the Commission in its review of the impact on small cable of the proposed leased access rules.

II. SPECIFIC ALLEGATIONS OF NONRESPONSIVENESS TO LEASED ACCESS REQUESTS WERE LIMITED TO LARGE OPERATORS.

A. Small Cable has not Stonewalled Leased Access; Programmers have Ignored Small Cable.

Many programmers filing comments make broad allegations of "stonewalling"[1], "hostility"[2] and "ruthless"[3] behavior on the part of cable operators toward leased access programmers. Those that name specific cable operators who have allegedly not complied with leased access requests name large operators.[4] Small cable has not hindered the development of leased access programming because programmers have had no interest in using small cable as an outlet. The SCBA member survey that showed that the vast majority of responding members had not received a single leased access information request over the last five years.[5]

Leased access programmers' interest in small cable is only now beginning to bud because the Commission's proposed leased access formula grants **free** access to small cable. Lack of programmer interest over the last twelve years does not justify the imposition of remedial measures by the Commission with respect to small cable.

B. Commentors Offer No Justifications for Imposing Punitive Sanctions on Small Cable

Several programmers advocate the imposition of harsh penalties for any operator found to have charged higher than permissible rates. Suggested penalties include refund of ***three times***

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[1]Sherjan Broadcasting Co. at 2.

[2]United Broadcasting Corporation, D/B/A TELEMIAMI at 2.

[3]*Id.*

[4]*See, e.g.,* WZBN TV-25 at 1 and BCB Broadcasting, Inc. at 2.

[5]SCBA Comments at 28.

all monies paid by the programmer and imposition of fines by the Commission.[6] The commentors fail to provide any justification for these punitive measures. Presumably, the alleged uncooperative history of the "vast majority of cable systems"[7] should justify these overreaching sanctions. Whether or not these are justified for the industry remains an issue for academic debate. The history of small cable, however, is devoid of culpable conduct. The Commission should not entertain any considerations of imposing such onerous provisions on small cable.

III. ESTABLISHING MAXIMUM PER SUBSCRIBER RATES IGNORES THE UNIQUE COST STRUCTURES OF SMALL CABLE.

A large number of programmers urge the Commission to adopt absolute rate ceilings based on de minimis per subscriber amounts.[8] The simplicity of fixed per subscriber amounts belies their danger. The commentors proposing these amounts that range from $0.0025[9] to $0.08[10] fail to present any rationale or evidence to support the amounts. Further, low per subscriber amounts ignore the reality of high per subscriber costs incurred by small cable -- costs that were extensively discussed and documented in SCBA's comments.[11]

Some Commentors attempt to overcome these concerns by proposing an appeal mechanism where operators with higher costs, or those who sought to recover transactional costs, could seek

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[6]*See, e.g.*, Landmark Broadcasting Ltd. at 2.

[7]Sherjan at 2.

[8]*See, e.g.*, Broadcasting Systems, Inc. at 2 and Vernon Watson WBOP TV-12 at 4.

[9]Broadcasting Systems. Inc. at 2.

[10]Blab Television Network, Inc. at 6.

[11]*See* SCBA Comments at 16-22.

waivers from the Commission to charge higher leased access fees.[12] As explained in SCBA's Comments, the cost of seeking relief on an individual case basis, especially where the Commission recognizes higher operating costs exist, wastes industry and Commission resources, only raising the cost of leased access.

The comments of the Hispanic Information and Telecommunications Network ("HITN") reveal the true rationale behind the fixed rate proposals. HITN urges the Commission to "focus...upon the Congressional policy to foster competition and diversity ***rather than the financial well-being of cable operators***."[13] HITN advocates that the Commission abandon concerns about compensating cable operators[14], even advocating that the charge in many instances should be "nominal".[15] These approaches directly conflict with the Congressional mandate, however, that cable not subsidize leased access.[16] The pricing proposals by the various programmers are without basis, self-serving and conflict with Congressional mandates. The Commission must establish rates that are fully compensable, recognizing that the cost for small systems to provide leased access is high when measured on a per subscriber basis.

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[12]*Id* at 7.

[13]HITN at 14.

[14]*Id* at 15.

[15]*Id* at 17.

[16]SCBA Comments at 3 and 7..

IV. PREFERENCE SHOULD NOT BE GIVEN TO LOW POWER TELEVISION AND OTHER "LOCAL" PROGRAMMERS BECAUSE THEY ARE NOT THE EXCLUSIVE SOURCE OF LOCAL PROGRAMMING.

A large number of owners and operators of low power television stations filed comments pleading for special preferences to save their businesses. Most low power commentors ask the Commission to use the leased access rules to remedy the harm incurred when Congress expressly refused to grant most low power stations must-carry rights.[17] Some make emotional appeals to give preference to save "my life's savings and my kids future...."[18]

The fact remains, however, that Congress made an important public policy decision not to grant low power signals must-carry rights. A Commission grant of preferences to confer similar carriage rights through low-cost preferential leased access provisions would blatantly circumvent the policy decision made by Congress. Also, no matter how emotional the appeals, the federal government has never and should never become the guarantors of the economic viability of any communications enterprise. Small cable has never asked for such guarantees, only relief from unreasonable regulatory restrictions and burdens.

Other low power stations argue that they should receive preferential treatment because they are the sole source of local community programming.[19] Not only is this proposition unsupported by the leased access statute, many small systems, despite the high per subscriber cost, provide local origination programming. A survey of SCBA members revealed that more than half (53%) of those responding provide locally originated community programming.

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[17]One commentor even asks the Commission "Way do they [full power stations] get Must Carry?" Erwin Scala Broadcasting Corporation at 2.

[18]Vernon Watson WBOP TV-12. Mr. Watson plainly asks the Commission for protectionist provisions: "I often wondered why did the FCC create a much needed service like LPTV and not create rules or incentives to protect it [sic] existence."

[19]*See, e.g.*, WZBN TV-25 at 2.

V. COMMERCIAL ADVERTISING PROGRAMMING SHOULD NOT HAVE ACCESS TO LEASED CAPACITY OR RATES.

SCBA raised concerns that the provision of free or low-cost leased access would exponentially increase demand for leased access. Inexpensive or free leased access will encourage public access and commercial advertisers to seek leased access capacity. As outlined in SCBA's Comments, free/low cost or subsidized leased access violates statutory and Congressional mandates.[20] Access Television Network also cites judicial precedent that commercial advertising providers cannot demand leased access capacity.[21] The authority cited by Access Television Network's should encourage the Commission to expressly restrict by regulation the ability of commercial advertisers to demand leased access capacity and rates. This clarification, while important, does not lessen the need for the Commission to craft leased access rates that are fully compensatory for small cable.

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[20]SCBA Comments at 3 and 7.

[21]Access at 5 ("In *Sofer v. United States*, No. 2:94cv1182, slip op. At 8 (E.D. Va. June 7, 1995) the court held that 'the leased access provision of the Cable Act and related regulations...have no application to commercial advertising.'")

VI. CONCLUSION

SCBA has presented this Commission with comprehensive analyses of the disparate burdens the Commission's proposed regulations wrongfully place on small cable. The comments filed by many leased access programmers and other interested parties validate SCBA's analysis and support its proposed modifications. SCBA respectfully requests that the Commission address the issues and adopt the recommendations contained in its Comments.

Respectfully submitted,

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May 31, 1996
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Exhibit H

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
Implementation of Sections 251, 252, and 253	)	
	)	

COMMENTS OF THE SMALL CABLE BUSINESS ASSOCIATION

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May 16, 1996

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SUMMARY

Small cable is poised to fulfill a critical role in bringing competition and innovation to the markets for telecommunications services, especially to rural and suburban markets. The Commission has previously recognized the need for rules that accommodate the unique circumstances of small cable. The Small Cable Business Association ("SCBA") provides the Commission with input essential to the development of regulations that take into consideration those unique factors, thereby facilitating effective implementation of the Telecommunications Act of 1996 ("1996 Act").

To ensure small cable's ability to provide competitive services, the Commission must adopt national standards to govern interconnection, unbundling, pricing, resale and arbitration. Without national standards, individual telcos or state commissions can easily raise entry barriers by refusing to deal with small cable or delaying entry efforts with extended and unaffordable administrative proceedings. Without national standards, the uncertainty of ever being able to launch competitive services will not only discourage small cable from trying, but will cause investors and creditors from not even considering these options.

The Commission should establish national standards for key issues such as the definition of good faith and dispute resolution methodologies. Although the Commission must define good faith, small cable needs more than a verbal definition. The Commission must establish negotiating standards and procedures on incumbent LECs to level the playing field

The Commission must also establish streamlined and low-cost dispute resolution mechanisms at the Commission available when small cable seeks redress for the absence of good faith. Without these alternative mechanisms, failure to deal in good faith will go unremedied because small cable will not be able to afford enforcement.

The Commission should also require state authorities to deal with small cable in a knowledgeable and efficient manner. The state authorities should be required to establish special contact persons and procedures to facilitate their understanding of small cable competition issues. By doing so, state proceedings will become not only more efficient, but a more meaningful and affordable process for enforcement of barriers thrown up to hinder small cable..

Although Congress sought to exempt certain rural telcos from interconnection requirements, the exemption must be narrowly applied to avoid undermining the goals of the 1996 Act. Even though the states determine the applicability of the exemption, the Commission must apply uniform national standards to those determinations to avoid creating a patchwork of 50 different sets of interconnection standards. The system must have certainty to encourage small cable to pursue interconnection and develop competition.

Similarly, the limitations on the exemption must also be carefully applied. Rural telcos must classify a request from an in-service-area cable operator as a bona fide request. The Commission must require states to examine the impact of proposed competition on all services and customers. National standards should also carefully screen out those telcos not entitled to exemption. Grandfathered providers of video programming should be limited to those telcos

actually providing service to a significant number of subscribers and even then the area limited to that where that service was provided prior to the 1996 Act.

Small cable faces many challenges. It also constitutes a major source of competition and advancement in telecommunications services for many rural and suburban areas. Small cable's resources to fight regulatory barriers are limited. With appropriate procompetitive regulations, applied on a national basis, small cable can play an important role in accomplishing the goals of the 1996 Act.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition	)	
Provisions in the Telecommunications Act	)	CC Docket No. 96-98
of 1996	)	
	)	
Implementation of Sections 251, 252, and 253	)	

COMMENTS OF THE SMALL CABLE BUSINESS ASSOCIATION

I. INTRODUCTION

The Small Cable Business Association ("SCBA"), through counsel, files these Comments in response to the *Notice of Proposed Rulemaking*, CC Docket No. 96-98, FCC 96-182 (released April 19, 1996) ("*Notice*"). In these Comments, SCBA provides specific recommendations for adoption by the Commission in implementing the provision of Sections 251, 252 and 253 of the 1996 Telecommunications Act ("1996 Act"). To genuinely and efficiently achieve the purposes of the 1996 Act, the Commission must adopt in this proceeding rules that accommodate the unique circumstances of small cable. In separate Comments, SCBA responds to the Initial Regulatory Flexibility Act Analysis in the *Notice*.

The Commission has recognized SCBA as a consistent and critical voice for the needs and concerns of small cable throughout the implementation of the Cable Television and Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). SCBA grew from the grass roots efforts of small operators attempting to cope with the onerous burdens of rate regulation under the 1992 Cable Act.

Through the efforts of SCBA and others, the Commission has recognized two vital aspects of small cable: (1) small cable has efficiently and effectively delivered high quality video programming to regions of the country not typically served by larger entities; and (2) Commission regulations can impose disparate administrative burdens and costs on small cable. In this rulemaking, the Commission can use its experience and adopt rules that will remove barriers to entry for the provision of telecommunications services in the markets served by small cable.

II. COMMISSION RULES SHOULD ACCOMMODATE THE KEY ROLE OF SMALL CABLE IN ACHIEVING THE GOALS OF THE 1996 ACT.

A. Small cable is essential to developing competitive markets for telecommunications services.

Small cable is poised to fulfill a critical role in bringing competition and innovation to the markets for telecommunications services. SCBA members are actively exploring the provision of telecommunications and information services including: facility-based local exchange services, resale of local exchange services, Internet access via cable and conventional modems, and intra and inter LATA toll services. In limited cases small cable systems are already providing some of these services, acting as laboratories for the development of competition.

With adequate consideration in this rulemaking, small cable can promptly bring competition for telecommunication services to niche urban markets, smaller communities and rural markets. Small cable has demonstrated that it can efficiently provide high quality cable services to regions that larger companies choose not to serve. With Commission regulations that accommodate the unique circumstances of small cable, small cable can bring competition and innovation in telecommunications services to these markets as well.

B. Congress and the Commission have recognized that small cable requires special rules.

It is both necessary and proper that the Commission adopt special rules for small cable in these proceedings. Congress and the Commission have recognized that the unique circumstances of small cable require special treatment by law and regulations. In the 1996 Act, Congress expressly removed substantial regulatory burdens from small cable.[1]

In implementing the 1992 Act, the Commission gradually developed recognition of the disparate impact of the administrative burdens and costs of rate regulation upon small cable.[2] In the *Small System Order*, the Commission ultimately recognized that it must adopt a special rate regulation methodology to accommodate the unique circumstances of small cable.[3] The Commission should apply its post-1992 Cable Act small cable experience to this rulemaking. At

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[1]1996 Act § 301(c).

[2]See *Sixth Report and Order and Eleventh Order on Reconsideration*, MM Docket Nos. 92-266 and 93-215, FCC 95-196 (released June 5, 1995) ("*Small System Order*") at ¶¶ 4-12.

[3]*Small System Order* at ¶¶ 54-64.

the outset, the Commission should establish rules to accommodate the unique circumstances of small cable.

In restructuring regulations to remove economic impediments to entry into local telecommunications markets, the Commission should recognize the unique impediments facing small cable. The fundamental impediment is the administrative burdens and costs of attempting to negotiate with incumbent LECs and the resultant state proceedings that will follow. Small cable also faces unique impediments in rural markets due to the rural telco exception to the duties of incumbent LECs.[4] Without procompetitive rules that accommodate small cable, these impediments will shackle competition in many markets.

In this proceeding, the Commission can anticipate the barriers to entry facing small cable and adopt rules designed to limit these barriers. In this way, the Commission will genuinely take a proactive role to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to *all* Americans,"[5] including those Americans served by small cable.

III. THE NEED FOR NATIONAL STANDARDS

A. SCBA supports the Commission in establishing national standards.

The Commission proposes national standards to govern interconnection, unbundling, pricing, resale and arbitration. Congress contemplated that the Commission would adopt national

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[4]1996 Act § 251(f)(1).

[5]S. Conf. Rep. No 104-230, 104th Cong., 2d Sess 1 (1996) ("Joint Explanatory Statement").

standards to effectively implement the 1996 Act's provisions. For example, in the context of §251, Congress not only stated its expectation that the Commission establish national standards, but that the Commission must assume jurisdiction from a non-compliant state regulatory agency:

> Subsection 251(I) requires the Commission to promulgate rules to implement section 251 within 6 months after enactment. If a State fails to carry out its responsibilities under section 251 in accordance with the rules promulgated by the Commission, the Senate intends that the Commission assume the responsibilities of the State in the applicable proceeding or matter.[6]

SCBA supports the Commission's goal in establishing "a uniform, pro-competitive policy framework."[7] This approach is essential to accomplish the following:

- Rapid private sector deployment of advanced telecommunications and information technologies and services.
- Minimizing state variations on critical terms of interconnect and resale agreements.
- Increasing certainty for all participants thereby reducing capital costs and attracting investment.
- Achieving network uniformity across markets.
- Streamlining negotiations by reducing areas for dispute.
- Constraining the incumbent LECs' bargaining power in negotiations thereby reducing one critical barrier to entry - the high transaction costs of negotiating with a monopoly.

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[6]Joint Explanatory Statement.

[7]*Notice* at ¶ 26.

- Providing guidance to the states for arbitrating interconnection agreements thereby reducing the cost, complexity, and interstate variations in these proceedings.

National standards will promote efficient competition in local telecommunications markets throughout the country. Efficient competition will benefit firms that can achieve technological innovation, improved service and cost control. Consumers will benefit through a more rapid transition to active competition, improved services, greater choice and lower costs. SCBA supports the comments of NCTA and CATA on the need for and content to national standards for interconnection and other implementation issues. For small cable, however, the national rules proposed in the *Notice* do not address significant barriers to entry.

B. The Commission needs to promulgate special national standards to remove barriers to entry for small cable.

To fully achieve Congress' goals of removing barriers to entry in telecommunications markets, the Commission should also adopt national standards applicable to the unique circumstances of small cable. The Commission has recognized the key role played by small cable in the delivery of video programming to suburban and rural areas.[8] Small cable operators are well positioned to deliver other telecommunication services to these markets. To make this competition possible, however, national rules that accommodate small cable are essential.

The Commission has ample support to adopt such rules. Congress recognized in the 1996 Act that the public interest will be served by special statutory provisions that remove the

[8]*Small System Order* at ¶ 27.

administrative burdens of rate regulation on many small cable systems.[9] Similarly, the Commission has found that small cable needs special rules. In the *Small System Order*, the Commission adopted a completely revised and streamlined rate regulatory regime for small cable systems and companies. In taking this action the Commission stated:

> We acknowledge that a large number of smaller cable operators face difficult challenges in attempting simultaneously to provide good service to subscribers, to charge reasonable rates, to upgrade networks, and to prepare for potential competition. Since passage of the 1992 Cable Act, the Commission has worked continuously with the small cable industry to learn more about their legitimate business needs and how our rate regulations might better enable them to provide good service to subscribes while charging reasonable rates.[10]

The development of small cable rules under the 1992 Cable Act was an evolutionary process. The Commission issued the *Small System Order* two years after released the initial *Rate Order*.[11] For small cable, those years were, in a word, painful. The overly burdensome rules during those years hindered the growth and development of small cable in rural markets, hurting residents of those areas.

The Commission can utilize its experience with small cable in this proceeding. The Commission can adopt procompetitive, national standards now that explicitly address the unique circumstances of small cable

C. Recommended standards for small cable.

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[9]1996 Act § 301(c).

[10]*Small System Order* at ¶ 25.

[11]The *Rate Order* was released May 3, 1993 and the *Small System Order* released June 5, 1995.

1. Duty of incumbent LECs to negotiate in good faith with small cable.

a. A verbal formula for "good faith" will not help small cable.

The Commission seeks comment on specific legal precedent regarding the duty to negotiate in good faith.[12] The Commission could adopt a verbal formula for "good faith" like that in the Uniform Commercial Code. In the UCC, "good faith" means honesty in fact in the conduct or transaction concerned[13] and observance by a merchant of reasonable commercial standards of fair dealing in the trade.[14] This generally aligns with the "no anticompetitive conduct" standard applied in *Southern Pacific Communications Co. v. ATT.*[15] These standards may help guide state commissions and the courts in resolving disputes. These standards will not help small cable companies that do not have the resources to litigate the issue of bad faith negotiation. Small cable needs more than a verbal formula for "good faith". The critical reason: the inestimable transaction costs of dealing with an incumbent LEC.

To enter the market for telecommunications services, a small cable company must plan for several costs. In most jurisdictions, it must plan for the substantial legal and administrative costs of an administrative proceeding to obtain a LEC license or certificate of public convenience and necessity. A small cable company must plan for the capital costs of facilities and equipment. It

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[12]*Notice* at ¶ 47.

[13]UCC § 1-201(19).

[14]UCC § 1-202, Official Comment.

[15]556 F. Supp. 825, 910-912 (D.C.C. 1983).

must also plan for the operating costs of providing the services offered. Small cable can reasonably ascertain these costs and budget for them. This process is essential to gaining access to capital.

One huge unknown cost remains: the cost of negotiating with an incumbent LEC. The Commission already has information concerning certain negotiation tactics employed by incumbent LECs.[16] The Ameritech/Time Warner Cable interconnect disputes in Ohio represent another daunting example of the "staying power" of incumbent LECs. SCBA is familiar with other tactics employed by Ameritech and others including: (1) a constantly changing "cast of characters" in negotiations; (2) refusal to resell packaged business local exchange services; (3) refusal to resell business local exchange services at rates that agents may sell those services; (4) refusal to resell business local exchange services at increments offered retail customers; (5) the general strategy of "holding out"; and (6) the demonstrated incumbent LEC preference to rely on costly administrative and legal process rather than negotiations. In addition to the other costs related to the provision of telecommunications services, small cable companies cannot finance a state administrative case or lawsuit against an incumbent LEC that may not negotiate in accordance with the Commission's "good faith" standard. Without rules and procedures to help small cable estimate and limit the costs of "good faith" negotiations, few, if any, investors or lenders will provide capital.

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[16]*Notice* at ¶¶ 31, 47 and 132.

The costs of such protracted negotiations, even with state arbitration, represent a barrier to entry for small cable. The Commission recognizes this concern about unequal bargaining power in negotiations with an incumbent LEC.[17] To ensure that competition comes to regions served by small cable, the Commission must help level the playing field.

b. The Commission should impose specific small cable "good faith" negotiation standards and procedures on incumbent LECS.

For small cable to enter telecommunications markets controlled by incumbent LECs, "good faith" negotiation must mean that small cable operators can estimate and minimize the time and costs of interconnection and resale negotiations. Small cable companies do not have the resources to endure protracted negotiations followed by costly administrative proceeding. The Commission has recognized the financial and personnel constraints on small cable and has modified regulations to accommodate these limits in other contexts.[18] Incumbents LECs have ample administrative and financial resources. This inequality represents a barrier to entry for small cable.

To remove this barrier, the Commission can adopt two requirements. First, incumbent LECs must designated a small company contact person. Upon request from a small company, an incumbent LEC should provide the name, address, phone numbers and times of availability of the designated small company contact. This named individual shall become familiar with, and responsible for, small company issues and negotiations with small companies. This will facilitate

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[17] *Id.*

[18] *Small System Order* at ¶¶ 55-56.